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December 7, 2011

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

FEE RECEIVED

DEC 7 - 2011

**SURFACE
TRANSPORTATION BOARD**

re: Docket No. FD 35449, Tennessee Southern Railroad Company,
Patriot Rail, LLC, Patriot Rail Holdings, LLC and Patriot Rail
Corp.-- Corporate Family Transaction Exemption -- Sacramento
Valley Railroad, LLC and Piedmont & Northern Railway, LLC

Dear Ms. Brown:

Enclosed for filing in the subject proceeding is Sierra Northern Railway's Petition to Nullify the Exemption.

By facsimile transmission yesterday, arrangements were made for payment of the \$250 filing fee.

Copies of this letter have been served upon all parties by e-mailing a copy to their counsel, Louis E. Gitomer, Esq, at Lou_Gitomer@verizon.net.

If you have any questions concerning the filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

cc: Louis E. Gitomer, Esq.

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**SURFACE
TRANSPORTATION BOARD**

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Docket No. FD 35449

**TENNESSEE SOUTHERN RAILROAD COMPANY, PATRIOT RAIL, LLC,
PATRIOT RAIL HOLDINGS, LLC AND PATRIOT RAIL CORP.
-- CORPORATE FAMILY TRANSACTION EXEMPTION --
SACRAMENTO VALLEY RAILROAD, LLC
AND PIEDMONT & NORTHERN RAILWAY, LLC**

**SIERRA NORTHERN RAILWAY'S
PETITION TO NULLIFY THE EXEMPTION**

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Attorneys for

SIERRA NORTHERN RAILWAY

Dated: December 7, 2011

SURFACE TRANSPORTATION BOARD

Docket No. FD 35449

TENNESSEE SOUTHERN RAILROAD COMPANY, PATRIOT RAIL, LLC,
PATRIOT RAIL HOLDINGS, LLC AND PATRIOT RAIL CORP.
-- CORPORATE FAMILY TRANSACTION EXEMPTION --
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AND PIEDMONT & NORTHERN RAILWAY, LLC

SIERRA NORTHERN RAILWAY'S
PETITION TO NULLIFY THE EXEMPTION

Petitioner, Sierra Northern Railway of Woodland, Calif. ("SERA"), pursuant to 49 U.S.C. §10502(d), 49 C.F.R. §1180.4(g)(ii) and the Board's Decision, served December 8, 2010, seeks the nullification of the exemption, and as grounds therefor SERA states, as follows:

1. SERA, a California corporation, is a Class III rail carrier subject to the jurisdiction of the Board. *See*, Docket No. 35490, *Sierra Northern Railway--Acquisition and Operation Exemption--Union Pacific Railroad Company*, served April 21, 2011. SERA is a wholly-owned subsidiary of Sierra Railroad Company of Davis, Calif. ("Sierra"), a non-carrier. *See*, STB Finance Docket No. 34360, *Sierra Railroad Company--Corporate Family Transaction Exemption--Yolo Shortline Railroad Company*, served June 23, 2003.

2. Sacramento Valley Railroad, Inc. of Boca Raton, Fla. ("SAV"), was a Class III rail carrier subject to the jurisdiction of the Board. *See*, STB Finance Docket No. 35117, *Sacramento Valley Railroad, Inc.--Operation Exemption--McClellan Business Park LLC*,

served February 14, 2008 and STB Finance Docket No. 35118, *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp.--Continuance in Control Exemption--Sacramento Valley Railroad, Inc.*, served February 14, 2008

3. SAV was and remains indirectly controlled by Patriot Rail, LLC of Boca Raton, Fla. ("PRL"), a non-carrier, through Patriot Rail Corp. ("Patriot"), another non-carrier, which indirectly controlled and continues to indirectly control several other short line rail carriers.

4. Sierra and Patriot in 2007 began negotiations for Patriot's purchase of Sierra, including SERA, which formerly had been named Yolo Shortline Railroad Company ("Yolo"). Yolo was the rail carrier authorized by the Board to render service on the seven miles of railroad tracks within the decommissioned McClellan Air Force Base, conveyed to the County of Sacramento. *See*, STB Finance Docket No. 34018, *Yolo Shortline Railroad Company--Acquisition and Operation Exemption--County of Sacramento, CA*, served March 27, 2001. The negotiations between Sierra and Patriot were subject to a non-disclosure/confidentiality agreement, and, in believing that it was protected by the agreement, Sierra provided Patriot with a wealth of proprietary financial and operating data, much of it dealing with SERA's operations on the seven miles of railroad tracks within the former McClellan Air Force Base.

5. In partial reliance of the proprietary financial and operating data received from Sierra and without advising it, Patriot Rail, LLC and its affiliates organized the Sacramento Valley Railroad, Inc, which made -- and won -- a bid to take over SERA's right to render operations on the seven miles of railroad tracks within what in the meantime had been allowed by the County of Sacramento to be established as the

McClellan Business Park, LLC ("McClellan"). *See*, STB Finance Docket No. 35117, *Sacramento Valley Railroad, Inc.--Operation Exemption--McClellan Business Park, LLC*, served February 14, 2008, and STB Finance Docket No. 35118, *Patriot Rail, LLC, Patriot Rail Holdings LLC and Patriot Rail Corp.--Continuance in Control Exemption--Sacramento Valley Railroad, Inc.*, served February 14, 2008.

6. When it learned of Patriot's underhanded dealings, Sierra sued Patriot for, among other things, unfair competition and misappropriation of trade secrets. Sierra's lawsuit was filed in the United States District Court for the Eastern District of California, Case No. 2:08-cv-00576-LEW-DAD, *Sierra Railroad Company v Patriot Rail Corp.* Insisting that it still intended to go forward with its proposed purchase of Sierra and SERA and agreeing to pay Sierra for its loss of the McClellan business, Patriot asked Sierra to dismiss its lawsuit, which Sierra did, without prejudice.

7. Following withdrawal of its lawsuit, Sierra resumed the negotiations with Patriot for the purchase by Patriot of Sierra and SERA. Ostensibly to demonstrate its good faith, Patriot even filed a Verified Notice of Exemption with the Board for its authorization to acquire Sierra and SERA. *See*, STB Finance Docket No. 35165, *Sierra & Central Pacific Railroad Company, Inc.--Acquisition and Operation Exemption--Sierra Northern Railway and Sierra Railroad Company*, served August 1, 2008, and STB Finance Docket No. 35166, *Patriot Rail, LLC, Patriot Rail Holdings LLC, and Patriot Rail Corp --Continuance in Control Exemption--Sierra & Central Pacific Railroad Company, Inc.*, served August 1, 2008. The STB approved transaction never was consummated, prompting Sierra, which believed that Patriot simply was stalling, to advise Patriot that it was prepared to refile its lawsuit. Patriot asked Sierra to hold off

doing so until Sierra had an opportunity to review Patriot's new purchase offer. Instead of submitting a new purchase offer, however, Patriot, on December 31, 2008, filed its own preemptive lawsuit against Sierra, which gave Sierra no alternative but to file a counterclaim against Patriot, which it did on January 27, 2009, in the United States District Court for the Eastern District of California, Case No. 2:09-cv-00009-MCE-EFB, *Patriot Rail Corp v Sierra Railroad Company*. In its counterclaims, Sierra, among other things, charges Patriot with creating SAV so as to improperly and unlawfully deny SERA the ability to render service as a rail carrier on the seven miles of railroad tracks in the McClellan complex. The lawsuit remains pending, and the trial, originally scheduled for March 2011, has been continued to July 16, 2012.

8. On November 22, 2010, Patriot Rail, LLC and its affiliates filed a Verified Notice of Exemption with the Board, proposing "to restructure [their] corporate family in order to make use of certain tax benefits." Among other things, SAV would be converted into a limited liability company under Delaware law and would be known as Sacramento Valley Railroad, LLC. In their filing, Patriot Rail, LLC and its affiliates reiterated, "The purpose of the transaction is to restructure the corporate family to make use of tax benefits." This claim is belied by the facts.

a. When they filed their Verified Notice of Exemption, Patriot Rail, LLC and its affiliates knew that the lawsuit with Sierra, in which Sierra is seeking more than \$15 million in compensatory damages, statutory treble damages and punitive damages, plus the return of SEAR's right to perform the McClellan operations, was due to go to trial less than four months later, in March 2011.. They also knew that, if Sierra prevailed

at trial, it more easily could collect any judgment from a corporation than from a Delaware limited liability company.

b. When they filed their Verified Notice of Exemption, Patriot Rail, LLC and its affiliates knew that Sierra was seeking to regain for SERA its right to render service within the McClellan complex, a right which had been wrested from it by SVA and constituted SVA's only asset. They also knew that by converting SVA from a corporation to a Delaware limited liability company, it would be more difficult for Sierra to obtain the return of that asset.

c. The conversion of SAV and the other of Patriot's subsidiaries to Delaware limited liability companies enabled Patriot to establish barriers to Sierra's ability to collect on any judgment against Patriot and SAV by limiting Sierra's access to the underlying assets of SAV and the other of Patriot's subsidiaries. Once they were converted to Delaware limited liability companies, Sierra very well may be required to seek a charging order (a right to collect distributions from the subsidiary entities to the parent) as its sole remedy to enforce its judgment.¹ Such a charging order is intended to provide asset protection by a subsidiary against the parent entity's creditors. This protection is not afforded corporations.

9. Uninformed of any of the foregoing, the Board not surprisingly granted Patriot Rail, LLC and its affiliates the requested authorization to restructure their subsidiaries, reiterating what they had told the Board, "The proposed transaction will allow [Patriot

¹ Under section 18-703(d) of the Delaware Limited Liability Company Act, "the entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of a member's assignee may satisfy a judgment out of the judgment debtor's limited liability company interests." Section 18-703(e) further provides that "No creditor of a member or of a member's assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company."

Rail, LLC] and the corporate family to make use of certain tax benefits as a result of the restructuring, without affecting operations or service." See, the Decision, served December 8, 2010.

10. SRA submits that the Verified Notice of Exemption which Patriot Rail, LLC and its affiliates filed on November 22, 2010, contained false or misleading information and that, therefore, the exemption conferred by the Board's Decision of December 8, 2010, is void *ab initio*. The Board's rules, 49 C.F.R. §§1180.4(g)(1)(i) & 1180.6(a)(1)(iii), require the disclosure of the "purpose to be accomplished by the proposed transaction", and Patriot Rail, LLC and its affiliates dissembled when they stated that the purpose of establishing SAV as a Delaware limited liability company was to gain certain tax advantages. The tax advantages afforded by the Delaware Limited Liability Company Act could have been obtained by Patriot Rail, LLC and its affiliates in January 2008 when they created SAV to wrest the McClellan business from SERA. The members and managers of Patriot Rail, LLC and its affiliates were well aware of the benefits to be obtained by organizing a company under the Delaware Limited Liability Company Act. Indeed, the parent company, Patriot Rail, LLC, in 2006 had been established as a Delaware limited liability company. The real purpose of the November 22, 2010, filing by Patriot Rail, LLC and its affiliates was not to gain certain tax advantages but to secure the greater protection of their assets which the Delaware Limited Liability Company Act provided in anticipation of a judgment against them in the pending District Court action. The voiding of the exemption will have far less of an impact upon Patriot Rail, LLC and its affiliates than the prejudice that Sierra and SERA

would suffer if the exemption were allowed to stand and Sierra were unable to collect a favorable judgment against Patriot in the upcoming trial in the District Court action.


WHEREFORE, Sierra Railroad Company asks the Board to find that the Verified Notice of Exemption of Patriot Rail, LLC and its affiliates, filed November 22, 2010, contained false or misleading information and to declare the exemption afforded by the Board's Decision, served December 8, 2010, void *ab initio*

Respectfully submitted,

SIERRA RAILROAD COMPANY

By its attorneys,

Torgny R. Nilsson
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Dated: December 7, 2011

CERTIFICATE OF SERVICE

I certify that I this day served the forgoing Petition to Revoke the Exemption on Patriot Rail, LLC and its affiliates by e-mailing a copy to their counsel, Louis E. Gitomer, Esq., at Lou_Gitomer@verizon.net.

Dated at Washington, DC, this 7th day of December 2011.


Fritz R. Kahn

VERIFICATION

I, David Magaw, President of Sierra Northern Railway of Woodland, Calif., declare under penalty of perjury, under the laws of the United States of America, that I have read the foregoing Petition to Nullify the Exemption and that its assertions are true and correct to the best of my knowledge, information and belief. I further declare that I am qualified and authorized to submit this verification on behalf of Sierra Northern Railway. I know that willful misstatements or omission of material fact constitute Federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to five years and fines up to \$10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621, which provides for fines up to \$2,000 or imprisonment up to five years for each offense.

Dated at Woodland, CA this 6th day of December 2011.


David Magaw